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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

No. 72-1241

IN THE MATTER OF
THE REINSTATEMENT OF
HARRY R. ILLMAN
Petitioner

REPLY BRIEF ON BEHALF OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972
No. 72-1241

HARRY R. ILLMAN
Petitioner

v.

THE TOLEDO BAR ASSOCIATION
Respondent

REPLY BRIEF ON BEHALF OF PETITIONER

Petitioner submits that the questions presented for review were properly raised in the record, argued and briefed below although not to the same extent as in the present brief, but sufficiently to satisfy the jurisdictional requirements of this Court.

Due process as such is incapable of exact definition. It is that kind of process that comports with the deepest notions of what is right and fair or just. It is inherent in all proceedings as part of our respect for the administration of justice. Where the facts of procedure in any cause, civil, criminal or like the one at Bar smacks of unfairness or wrong doing that taints respect for administration of justice then due process should be an issue and be assertible at any stage of such proceeding. A litigant is not bound to follow any particular form of words or phrases. "If the record as a whole shows either expressly or by clear intendment (the federal claim is asserted and called the states attention) the claim is regarded as having been adequately presented." New York ex rel *Bryant v. Zimmerman*, 278 U.S. 63, 67.

In *Fuentes v. Shevin*, 407 U.S. 67, 82 it was stated "due process tolerates variances in the form of a hearing appropriate to the nature of the case . . . dependent upon the importance of the interests involved and the nature of the subsequent proceedings, if any . . ."

Each of the questions presented were duly raised in the Court below as outlined herein.

Question 1. After the Panel made its written findings, Petitioner filed his brief with objections and exceptions to such findings in the Ohio Supreme Court. Appendix B, p. 35 indicates the Ohio Supreme Court ruled on Petitioner's objections. An exception to all their findings as being unfounded in law and fact was thus made. If the contention is vehemently asserted that the findings are unlawful isn't that the same thing as contending they are unreasonable and arbitrary? The equation would be illegal and unlawful = arbitrary and unreasonable = denial of due process. *Schware v. State Board*, 353 U.S. 232 which was cited in petitioner's brief below. The term due process is determined from the facts arising in the causes in which asserted and in this case the facts themselves cry out for fairness. Like in the Schware decision, Petitioner here made a strong showing of good moral character. The witnesses on his educational qualities and work habits had fresh recollections at the time of hearing, but these could be dimmed by passage of time, likewise lay witnesses might be reluctant to testify after rejection so unless he prevailed, he might be irretrievably lost was also an argument used below for the loss of evidence can lead to a loss of due process.

Question 2. The exceptions taken are asserted in the record as disclosed by Petitioner's brief. Respondent does deny such record although they could have done so. There was exception taken to the illegal exhibit (A & B) (R. 258, 260, 302). Petition expressed surprise on the appearance of Bar witnesses (R. 381) and in the stipulation where "he was surprised by such testimony." Had the Bar filed a responsive pleading to his Petition, surprise would not have occurred. The "chilling effect argument" was asserted in the motion for rehearing (p. 2-3) consequently the legal equation would be surprise, use of inadmissable and prejudicial exhibits which have a chilling effect on Petitioner, his cause and counsel = denial of procedural due process.

Due process therefore must be ubiquitous in legal proceedings of an adversary nature.

Question 3. The Bar asked the Panel to take judicial notice (R. 301) of its own record and submitted the 1969 proceeding involving these parties into the record. *Toledo Bar v. Illman*,

18 O.S. 2d 122. Since the Court looked at the 1952 Exhibit A, the issue of whether enhancement of penalty based on the same old charge was properly before this Court. This is part of the entire due process issue on fair trial or illegal result where the Bar constantly pounds away on the 1952 charges without any new proof and uses such as substantive evidence to enhance the penalty. There is no question on the prejudicial effect of such charges for the Panel used the same as a predicate for their adverse findings (A. 30) including comments on the contents of such charges. The Bar itself raised this issue in the proceedings below by asking for judicial notice of the record. The Rules required Petitioner to set forth any prior disciplinary proceedings so he complied with such requirement by asserting in his petition the 1952 case, but asserted no record was made therein. This was never denied or refuted in any way in the proceedings below.

Question 4. In addition to the facts in the prior paragraph, the Panel stated at R. 322:

> "The Supreme Court of the State of Ohio said he was guilty of unprofessional conduct and they suspended him indefinitely . . . We know about that and the burden by clear and convincing evidence on Mr. Illman to show that he had rehabilitated himself and that he has changed from his previous attitude on these two previous charges there, so these exceptions are in . . ."

Since the Panel knew of the burden of proof and recognized the question there was no further need to except because counsel for Petitioner had taken a general objection to all cross-examination unless connected (R. 310) which was repeated (R. 315, 319, 320).

The Ohio courts take judicial notice of the Federal Constitution and its amendments. *Driggs v. State,* 52 O.S. 37; *Erie Railroad Co. v. Welsh,* 89 O.S. 81, 242 U.S. 303. Under the new rules of Civil Procedure CR 44.1 subd A, para 1.

> "The Ohio rules of Civil Procedure provide that judicial notice shall be taken of the rules of the Supreme Court of this State and of the decisional, constitutional and public statutory laws of this State."

Therefore, Question 4 is patently present in the record.

Question 5. This issue is the most cogent reason for this Court to take jurisdiction in this case. It is apparent from the record hereof, the brief of the Bar herein that conduct of counsel in quasi-criminal cases should receive judicial scrutiny. When the Bar counsel becomes aware of illegality or tainted evidence and proceedings in all prior hearings yet fails to disclose such facts, isn't that withholding in and of itself a denial of due process? In *Napue v. Illinois*, 360 U.S. 264, where a prosecution witness testified he received no promises in exchange for his testimony and the prosecutor did nothing to change it knowing it was false, this Court held there was a denial of due process. In these entire proceedings, the Bar has acted in a similar manner. The rules reiterated in criminal cases "it is not the duty to prosecute but to see that justice is done," "it is the duty of the Prosecutor to bring in all exculpatory as well as all incriminating evidence" and "the duty is greater on the prosecutor than on the defendant" are equally applicable here but for lack of judicial guidance through this Court, such rules will be ignored at a time when soul-searching is required.

Petitioner is not asking the Court to weigh any evidence but merely to determine whether he received substantive or procedural due process.

Petitioner further submits that even if the foregoing was not true, jurisdictional issues can always be considered, even sua sponte, whether or not raised below. *U.S. v. Storer Broadcasting Co.*, 351 U.S. 193, 197; *Gutieriez v. Waterman S. S. Co.*, 373 U.S. 206, 209.

The Court also has the power to notice a plain error not assigned. Rule 40 (1) (d) (2) *Brotherhood of Carpenters v. U.S.* 330 U.S. 395, 412; *Silber v. U.S.* 370 U.S. 717; *Pipefitter et al v. U.S.* 407 U.S. 385, 442.

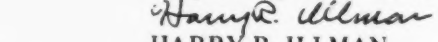
Blonder-Tongue v. University Foundation, 402 U.S. 313, 321 "Rule 21 (1) (c) does not limit our power to decide important questions not raised by the parties." Due process is the essence of justice. It should be questioned in every case where issue arises from facts or law.

Petitioner respectfully submits that the position of the Bar on the jurisdictional issue is not well taken. This case is of general and public interest. Problems will recur unless certified for this Court must recognize Brandies' admonition "The greatest

dangers to liberty lurk in assiduous encroachment by men of zeal, well meaning but without understanding."

The Bar here presumes due process because they do not comprehend what is truly required, and this Court must spell it out for all parties involved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief on Behalf of Petitioner was mailed with first class postage pre-paid to Charles E. Ide, Jr., Esq., 1018 United Savings Building, Toledo, Ohio 43604, Jamille G. Jamra, Esq., 700 United Savings Building, Toledo, Ohio 43604 and Maurice D. O'Connell, Jr., 425 L-O-F Building, Toledo, Ohio 43604, on this 6th day of April, 1973.

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